## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: March 28, 2008

TO : Alan Reichard, Regional Director

Region 32

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: General Growth Properties

Cases 32-CA-23608 and 32-CA-23734

This Section 8(a)(1) case was submitted for advice on several issues arising from the Employer's maintenance of rules limiting free speech activity and denial of access to Union handbillers on its California mall property.

We conclude that the Employer's rule prohibiting access to the mall "for any activity of a commercial nature" but specifically excluding "free speech/free expression activity," is not unlawful. We further conclude that the permit requirements are also not unlawful as they are aimed at securing compliance with the prohibition on commercial activity. Consequently, the Employer did not violate the Act by denying access to the handbillers who failed to obtain a permit prior to handbilling the mall property.

## **FACTS**

The Employer is a corporation that owns, develops, operates and/or manages over 200 shopping malls throughout the United States, including the West Valley Mall in Tracy, California. The Employer contracts with two nationwide janitorial companies to provide the cleaning services at its malls. The Service Employees International Union is engaged in a nationwide organizing campaign to organize the janitorial workers at all the Employer's shopping malls in the country. In early July, 2007, 1 the statewide janitorial local, SEIU Local 1877 (the Union), began organizing at the Employer's Tracy mall.

The Employer maintains rules for the purpose of regulating the activities of all individuals, groups and organizations engaged in free speech/free expression activity at its malls. At issue here are the Employer's rules entitled Rules for Conducting Free Speech/Free Expression Activity at West Valley Mall. The Rules

 $<sup>^{1}</sup>$  All dates are in 2007.

expressly prohibit any "activity of a commercial nature," including requests for donations, or fund raising, and further state that "Nothing contained in these rules is intended to authorize limitation or restriction of free speech/free expression activity at the Mall on the basis of the particular cause advocated by the Petitioners." The Rules define free speech/free expression activity as "any conduct by which "Petitioners" (individuals, groups or organizations) seek to disseminate or express ideas, philosophies, obtain signatures for any petition directed to any governmental or political body, conduct voter registration drives, and all similar activities."

The Rules require all Petitioners to submit a written application to obtain a permit prior to engaging in any free speech/free expression activity. Applicants must also submit samples of any literature to be distributed, and must indicate whether the group or individual will receive any compensation from any source for the activities conducted on mall property. The applicant must also indicate whether the group has engaged in similar activities elsewhere, providing the dates and places of such activities.

On August 23, five Union handbillers arrived at the Employer's West Valley Mall in Tracy at 11:00 a.m. and attempted to pass out handbills to the public. The handbills named the two janitorial employers who employ the janitorial employees, and generally claimed that those employees receive low wages and no affordable health care. The handbills urged the Employer to be a "good neighbor and provide good jobs" and asked consumers to tell the Employer to "make room for good jobs."

The Region has found that, within minutes of commencing their handbilling activity in the mall, the Employer's mall managers interrupted the activity, confiscated the handbills, asked the handbillers to leave, and threatened to call the police. There is no dispute that the handbillers did not apply for permission to handbill in the mall prior to commencing their activity.

The Union claims that the Employer failed to apprise the handbillers of the procedures for obtaining a permit to handbill in the mall. According to the Employer, sometime in late July the management of the Employer's Glendale California mall gave Union representatives there copies of its rules regarding free speech/free expression activity. The communities of Glendale and Tracy are separated by a five hour drive, and the handbillers in Glendale were not the same individuals as those handbilling in Tracy.

The Employer claims that it maintains its Rules to protect its property interests, and the interests of its rent-paying tenants, by consistently declining to grant access to 'free riders' who would enter the mall premises and engage in "commercial speech" for the sale of goods or services without paying rent. The Employer stated that it does not consider commercial speech or activity to include union activity and that it applies its access policy consistent with this position.

## ACTION

The Region should dismiss the complaint, absent withdrawal.

First, we agree with the Region that the Employer did not violate the Act by maintaining a rule that expressly prohibits "any activity of a commercial nature." The rule, both on its face and as explained by the Employer, is intended only to restrict actual commercial activity, i.e., sales of goods and services that might compete with the business of the mall's rent-paying occupants. The rule specifically states further that it is not intended to limit or restrict free speech/free expression activity in support of "a cause." This facial qualification is evidence that the rule is not intended to reasonably interfere with Section 7 activity, and the Employer has stated as such.

The Employer's rule prohibiting activity of a commercial nature is unlike the rule found unlawful in <a href="Macerich Management Co.">Macerich Management Co.</a>. In that case, the Board found unlawful a rule banning signage and written materials that interfere with the "commercial purpose" of a California mall, because the rule was intended to "place restrictions on the content of the message so as to limit any negative publicity and not hurt sales." Unlike the rule in <a href="Macerich">Macerich</a>, which regulated content, the rule at issue here prohibits only the activity of commercial competition and, on its face, allows the type of negative publicity that Section 7 protects and the <a href="Macerich">Macerich</a> rule intended to prohibit. \( ^4 \)

<sup>&</sup>lt;sup>2</sup> 345 NLRB 514 (2005).

 $<sup>^{3}</sup>$  Id. at 516.

 $<sup>^4</sup>$  The decision of the California Supreme Court in Fashion Valley Mall v. NLRB, 42 Cal.4<sup>th</sup> 850, 69 Cal.Rptr.3d 288, 172 P.3d 742 (December 24, 2007), is not applicable because it was also concerned with restrictions on content. In that case, the court held that a mall owner's rule prohibiting a

Because the rule was intended only to prohibit non-tenant commercial activity in the mall, we conclude that the Employer's application process was also not unlawful. The application process was the Employer's means of ensuring compliance with its lawful rule banning commercial activity. And, because the Union failed to comply with the Employer's lawful permit requirement, we conclude that the Employer's efforts to eject the handbillers from the mall did not run afoul of the Act.<sup>5</sup>

Accordingly, the Region should dismiss these charges, absent withdrawal. In its dismissal letter, the Region should specify that the Employer's denial of access was not unlawful in the circumstances presented here because the handbillers did not comply with the permit process.

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union from urging customers to boycott a store in the mall was not content neutral and did not survive the strict scrutiny test under the state constitutional free speech provision.

<sup>&</sup>lt;sup>5</sup> We need not reach the question of whether the Employer was obligated to notify the Union of its access rules, since it appears the Union was put on notice of the Employer's rules regarding access to its malls. The Union is a statewide local, and received a copy of the Employer's rules at the Glendale mall. Thus, even if these particular handbillers did not receive prior notice it is clear that the Union conducting the handbilling had been put on notice of the Employer's access requirements.